IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 41

CHESTER G. BOLLENBACH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF ON BEHALF OF THE PETITIONER

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Preliminary Statement

The cause comes before the Court upon a writ of certiorari allowed by this Court on April 2, 1945 (p. 471; 65 Sup. Ct. Rep. 915; 323 U. S. page III, Advance Sheet No. 4, not yet officially reported), to review a judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York convicting the defendant of the crime of conspiracy to transport in interstate commerce securities of the value of $5,000 or more, knowing them to have been stolen (1 pp. 403, 468-69).

[1] Unless otherwise stated, the page and folio references in this brief are to the printed transcript of the record.

There was no opinion delivered by Judge Moscowitz in the District Court. The opinion originally delivered in the Circuit Court of Appeals reversed the judgment of conviction and ordered a new trial (pp. 433-39). On application of the United States for rehearing, however, the court below changed the last paragraph of its prior opinion, and thereupon affirmed the conviction (p. 450). Its opinion, as thus corrected, is reported in 147 F. (2d) 199.

The jurisdiction of this Court is invoked pursuant to section 240 (a) of the Judicial Code, as amended February 13, 1925 (c. 229, 43 Stat. 936).

The statutes involved herein are all part of Title 18 of the United States Code, being sections 88, 415, 416, 417, 550, and 551 thereof. The sections of the National Stolen Property Act (i. e., secs. 415, 416, and 417 of the United States Code, above referred to), as they stood prior to amendment on August 3, 1939, are the only sections of that statute applicable in the case at bar. The pertinent portions of the foregoing enactments are quoted in the discussion which follows; and the statutes, as they were before and after said amendment, are printed in full in the appendix to this brief.

Statement of Case

Introduction

The defendant-petitioner herein was indicted in the Southern District of New York on two counts (pp. 3-6). The first count charged the defendant and others with transporting stolen securities in interstate commerce from Minneapolis in Minnesota to New York City (pp. 3-4). The second count charged the same parties with conspiring so to do (p. 4). A severance was granted the defendant-petitioner (fol. 4). On the trial, he was acquitted of the substantive crime, but found guilty upon the conspiracy

count (fols. 4, 1044). He was thereupon sentenced to two years' imprisonment and fined $10,000 (fols. 5, 1046, 1207-9).

In its original opinion, the court below reversed the conviction, because the trial judge had erroneously charged the jury that the possession of the stolen securities by the defendant raised a presumption that he had transported them in interstate commerce (fols. 1041-42, 1306-16). In its opinion on the rehearing, however, the Circuit Court of Appeals, while reaffirming its holding that that charge of the trial court was erroneous, nevertheless held that the error was negligible, because of the fact that the defendant knew that the stolen bonds came from another state (p. 450).

There was no proof in the case that the defendant had stolen or transported the securities. Indeed, his acquittal on the first count constituted a clear finding of the jury to the contrary. His connection with the transactions in question, as the court below itself recognized (fols. 1305, 1309), came afterward, after the bonds were stolen and had come to rest in New York. Then it was that he helped to dispose of some of them.[2] The indictment, however, alleged no conspiracy to dispose of the stolen securities; it concerned itself solely with a conspiracy to transport them from Minneapolis to New York (p. 4). And, manifestly, that conspiracy was concluded before the defendant aided in selling any of the bonds or notes. That fact, too, the Circuit Court of Appeals acknowledged. It said (fol. 1309):

> "Strictly speaking, that [i. e., the disposal of the bonds] was not any part of the crime for which he was indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

[2] That was conceded by the Government in its brief (p. 10) in opposition to our application for a writ of certiorari. It was there stated: "The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds • • • he participated in the transaction only after the bonds were brought to New York."

Obviously if both of the crimes charged in the indictment ended when the stolen securities reached New York, it is certainly difficult to perceive how the defendant's knowledge, when, or after, he helped to dispose of the bonds, that they had been stolen out west, would reopen the already concluded conspiracy and render him a party to the previously completed conspiracy to transport the bonds. Plainly the Circuit Court of Appeals had no warrant in that fact for holding the defendant to be a co-conspirator and changing its original decision.

Summary of Pertinent Facts

Although the record is fairly long, the facts necessary to a disposition of the case at bar lie within narrow compass. Prior to 1935 the Minnesota & Ontario Paper Company was in bankruptcy in the United States District Court at Minneapolis (fols. 82-3). In that proceeding, creditors had filed proofs of claim and had attached thereto their 6 per cent gold notes of the company, due March 1, 1931 (fol. 43). January 21, 1935, those claims were allowed as filed (Ex. F, p. 401).

In January, 1937, one Peter W. Burns was in the Minneapolis courthouse several times (fols. 936-37, 943). While there, he stole twenty-five of the aforesaid gold notes which were attached to proofs of claim (fols. 26-40, 44-49, 680, 690-92, 742-43, 1180-81). Burns returned to New York City on Sunday, January 31, 1937 (fols. 940-42).

The defendant in the case at bar never was in Minneapolis (fols. 181-3, 186, 205-7, 938, 1152). Indeed, on February 1, 1937, he and his brother were in Shamokin, Pennsylvania, where he stayed at a hotel, attended a stockholders' meeting, and wrote his wife a letter (pp. 322-26; Ex. E, p. 400). Nevertheless, this was the day when the thoroughly discredited witness Chell Smith (pp. 34-56) pretended he saw

the defendant in Minneapolis (fols. 930-31). The jury quite obviously did not believe that plainly incredible testimony; nor did they believe that the defendant was in Minneapolis when the bonds were stolen, since they acquitted the defendant of the charge of transporting the securities from Minneapolis to New York.

After Burns returned to New York with the stolen securities on January 31, 1937, he took steps looking to the disposition of the stolen securities. The following day, Monday, February 1, 1937, Burns, using the alias Arnold Berendson, under which he was indicted (fol. 8) and by which he was known (fol. 517), telephoned the brokerage house of Hart Smith & Company, and inquired whether they could sell some Minnesota & Ontario Paper Company gold notes for him (fols. 240-43). Subsequently Hart Smith & Company purchased ten of those gold notes from Berendson (fols. 243-44, 245, 249). On February 3, 1937, they issued their check for $2500 in payment for the ten bonds (fols. 249, 276-77; Ex. 7, fol. 1052). A typewritten endorsement was thereupon placed on the check (fol. 1052), and Burns opened an account with it, in the name of Arnold Berendson, at the National Safety Bank & Trust Company on the same day (fol. 504; Ex. 23-25, fols. 1064-67, 397-404). The bank, however, declined to clear the check without a personal endorsement by Berendson (fols. 417-18). Thereupon Burns employed Manning & Company to endeavor to secure from the bank either payment of the check or the return thereof (fols. 491, 505-9). One Jacobson introduced Burns to Manning, calling Burns by the name of Berendson on that occasion (fols. 502-4). However, Manning & Company did not succeed in doing anything for Burns; payment had been stopped on the check, and Burns never got back either the ten stolen notes nor the $2500 check given therefor (fols. 281-297, 421).

Having had this difficulty in respect of the first ten stolen bonds, Burns now sought help in disposing of the remaining fifteen. To that end, he called on the defendant (fol. 1179) on about the fifth of February, 1937 (fols. 728-29, 743, 942-43). The defendant suggested that they take the matter up with one Turley, a lawyer who had an interest in the brokerage firm of Blaser & Ingalls (fols. 609, 758, 1179). Neither Blaser nor Ingalls had ever met the defendant before (fols. 618, 728). Turley thereupon arranged a meeting of the parties, with the result that Turley had Blaser & Ingalls sell the remaining fifteen Minnesota & Ontario Paper Company gold notes on February 8, 1937, for $4,050 for the account of a fictitious Walter T. Roberts, who purported to reside at the Hotel New Yorker (fols. 620-21, 633-34, 636-40; Ex. 48-50, p. 364). It was Burns who went to the Hotel New Yorker to establish the hotel as the address of the alleged Roberts, and to obtain hotel stationery to use in the transaction (fols. 1184-85; Ex. 48, fol. 1090). Out of the $4,050 realized on the sale of the fifteen notes, Turley gave the defendant what in the end amounted to about $900 (fol. 1189).

The Court will not fail to observe that the defendant-petitioner's participation relates entirely to the disposition of some of the stolen bonds, and has nothing to do with their theft or transportation.

Questions Presented

The exceptions of the defendant [3] and the assignments of error [4] present the questions enumerated below:

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[3] Exceptions: fols. 198, 201, 241, 243, 288-96, 308-11, 381-91, 398, 402-3, 408-13, 418, 425-26, 447, 449-50, 466-67, 510, 524-25, 526-27, 612, 627-28, 634, 639, 641-42, 655, 663-64, 667, 669-70, 672-75, 763, 765, 766, 911, 919, 920, 924-28, 929, 982, 1036, 1039, 1040, 1042-43, 1044-45.

[4] Assignments of errors: fols. 1220-23, 1233-34, 1236-46, 1264-68, 1269-86.

1. Did the court below err in sustaining the conviction of the defendant-petitioner of an offense which, in the language of that court itself (fol. 1309), "was not any part of the crime for which he had been indicted"?

2. Did the court below err in ruling that, under the statute in the form in which it was when the alleged offense was committed, the disposal of securities, at rest in New York and stolen while not moving in or constituting part of interstate commerce, constituted a crime against the United States?

3. Did the court below err in holding that this defendant was guilty as an accessory after the fact of a conspiracy, and in sustaining his conviction on an indictment which charged him as a principal and not otherwise and in thereupon upholding his sentence as such principal, when it was double that which could be lawfully inflicted upon an accessory after the fact?

4. Did the court below err in reversing its original holding herein that the erroneous charge given by the trial judge warranted a new trial?

5. Did the court below err in holding that, under the statute as it stood at the time when the alleged offense was committed, the stolen securities had the necessary value prescribed in said statute, particularly in view of the fact that these securities had theretofore been merged into allowed claims in bankruptcy and thus were no longer operative instruments having any value?

BRIEF SUMMARY OF PETITIONER'S CONTENTIONS

Point I in the argument below discusses the first of the foregoing questions; point II deals with the second and third questions; point III is concerned with the fourth question, and point IV considers the fifth question.

It is petitioner's contention that the court below erred in its determination of each of the foregoing questions. It is respectfully submitted that, under the federal statute, as it stood when the alleged offense was committed and prior to the amendment thereof a year and a half later, it was not a crime against the United States to help dispose of securities stolen while not a part of interstate commerce, nor to conspire to that end.

Some additional facts, and an account of pertinent proceedings, both at the trial and in the court below, are set forth in the following points, in order to avoid repetition.

ARGUMENT

I

The court below erred in sustaining the conviction of the defendant of an offense which was no part of the crime for which he was indicted.

As has already been stated, the indictment charged the defendant herein with two offenses: one was the substantive crime of transporting and causing to be transported in interstate commerce the stolen bonds or notes, and the other was the crime of conspiring with others to transport those bonds or notes in interstate commerce (pp. 3-4). The acquittal of the defendant on the first count, which charged the substantive crime, absolved him of all complicity in the theft and transportation of the bonds, whether as principal or as aider and abettor. This Court is therefore now concerned only with the second or conspiracy count of the indictment, that being the only offense of which the defendant stands convicted.

Perusal of the second count in the indictment (p. 4) will at once disclose that the sole conspiracy which it alleges is a conspiracy to transport and cause the stolen bonds to be transported from Minneapolis in Minnesota to New

York City. It charges nothing else. It does not declare upon any conspiracy to sell, or otherwise dispose of the bonds, *after* they were transported from Minneapolis to New York.[2] The only accusation, of whose nature and cause the defendant was informed by the second count in the indictment as required by the sixth article of amendment to the Constitution, was the accusation of a conspiracy to transport the stolen bonds in interstate commerce. That is therefore the only charge on which he could be lawfully convicted under the second count of the indictment.

"A conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry* v. *United States*, 7 F. (2d) 28, 30. If the constitutional mandate in the fifth amendment, that no person shall be held to answer for an infamous crime except upon a presentment or indictment of a grand jury, is to be respected, the crime charged by the grand jury—and *no* other crime—can furnish the basis for a conviction. The charge is, consequently, necessarily limited to that which is set forth in the indictment; and to that alone. Accordingly, it is our firmly established law that a defendant may not be indicted for one conspiracy and then be convicted thereunder of another conspiracy. *Terry* v. *United States*, 7 F. (2d) 28; *Malaga* v. *United States*, 57 F. (2d) 822, 825; *United States* v. *Byers*, 73 F. (2d) 419, 421, 422.

In the *Byers* case, *supra*, the indictment accused the defendants of a conspiracy fraudulently *to purchase goods* of the United States. They were convicted, however, of a conspiracy *to dispose of the goods* in fraud of the United States. The Circuit Court of Appeals reversed the conviction. It pointed out (73 F. (2d) at pp. 421, 422) that:

> "A conspiracy so to sell is not charged in any way in the indictment. To find the defendants guilty of

> a conspiracy to sell is to find them guilty of something with which they are not charged * * *. It is necessary that a defendant be found guilty, if at all, only of the crime charged in the indictment. A conviction for one conspiracy cannot be sustained under an indictment for a separate and distinct conspiracy."

As Chief Justice Marshall long ago observed (*The Schooner Hoppett* v. *United States*, 7 Cranch 389, 393-4):

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence."

It is therefore of first importance in the case at bar to bear in mind that this defendant had no part in the transportation of the stolen bonds; the jury acquitted him of that charge. The evidence showed that his connection with the bonds arose only after they had been transported from Minneapolis to New York and had come to rest here. What he did had to do exclusively with efforts *to dispose of the bonds after they reached their intended destination.* Such conduct may have been violative of the law of the State of New York, but it is clear that it did not constitute a part of any conspiracy to transport the stolen bonds from Minneapolis to New York. That offense—the only federal offense of which he was convicted—ended with the completion of the transportation.

The object of the conspiracy charged was to transport the bonds to New York. It was not charged that the conspiracy had any additional purpose, as, for example, to dispose of the bonds after they arrived in New York. It is the assumption to the contrary (Fols. 1309-10) which misled the court below.

It is manifest that the object of the conspiracy alleged was fully attained when the bonds came to New York;

and, under this indictment, what happened to them thereafter was quite immaterial. Whether or not the bonds were subsequently sold or otherwise disposed of, the conspiracy averred in the indictment was complete, finished, and consummated; and what happened thereafter could not constitute any part of the conspiracy charged, since that conspiracy had already become an executed transaction and passed into history.

The court below expressly recognized that to be the fact. In its opinion, it first observed that "the fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter" (fol. 1305); and, referring to the fact that the defendant joined only in the disposal of the stolen securities after their transportation had ended, the Circuit Court of Appeals declared (fol. 1309) that:

> "Strictly speaking, that was not any part of the crime for which he was indicted; the substantive crime —and also the conspiracy to commit it—ended when the notes came to rest in New York."

The Court below, however, went on to say that it was also a crime to dispose of the bonds, and "therefore also a crime to join a conspiracy to dispose of them" (fol. 1309). In other words, while it in effect acknowledged that the defendant was not guilty of any conspiracy to transport the bonds, it declared that he was guilty of a quite different conspiracy, namely, one to dispose of the bonds. Even if we assume for the purposes of the argument, that the defendant was involved in a conspiracy to dispose of the bonds, the fact nevertheless still remains that the indictment nowhere charges any conspiracy to dispose of the bonds; that it confines itself entirely to a

conspiracy to transport the bonds; and hence it is quite apparent that, while the court below found the defendant guiltless of the only conspiracy for which he was indicted, it nevertheless affirmed his conviction of *that* crime, solely because it regarded him as guilty of another crime, a conspiracy not even mentioned in the charge for which he was tried and of which convicted. We repeat what was said in *United States* v. *Byers*, 73 F. (2d) 419, 422:

> "A conviction for one conspiracy cannot be sustained under an indictment for a separate and distinct conspiracy."

No other result is consonant with reason. The illegal agreement is the gist of the crime of conspiracy. *United States* v. *Britton*, 108 U. S. 199, 204; *Hyde* v. *Shine*, 199 U. S. 62, 76; *United States* v. *Cohen*, 145 F. (2d) 82, 94. In the case at bar, therefore, the heart of the crime in question consists of the conspiracy to transport, and nothing else. Nowhere—not even in the overt acts alleged (pp. 4-6)—is the defendant charged with any conspiracy to dispose of the goods after their transportation was concluded. Hence it is patent that the object of the conspiracy alleged was accomplished in the case at bar. And obviously one cannot join a conspiracy after it is all over and done. *Lonabaugh* v. *United States*, 179 Fed. 476; *De Luca* v. *United States*, 299 Fed. 741, 745; *Gable* v. *United States*, 84 F. (2d) 929. One of the jurors in this case apparently had that thought in mind, for he asked the trial judge, "Can an act of conspiracy be performed after the crime is committed?" (fol. 1032); but, despite the clearly settled law, the judge made no answer to the question (fol. 1306).

In the *Gable* case, *supra*, the Court of Appeals of the Seventh Circuit had before it a charge that the defendant had engaged in a conspiracy to transport stolen securities in interstate commerce. There the bonds had been stolen

in Missouri and brought to Chicago. "Upon arrival in Chicago they were taken to the appellant [Gable] for sale" (84 F. (2d) at p. 930). He thus had part in the disposal of the stolen bonds. Nevertheless, the court held that he was not guilty of any federal crime. It ruled as follows (84 F. (2d) at p. 930):

> "Nor is there any proof of conspiracy upon the part of appellant to transport in interstate commerce stolen property * * *. *The only proof is that after the bonds had been stolen and transported and delivered to him, he agreed, for a commission, to dispose of the same. This is not proof of the conspiracy charged.* With what his guilt may be under the statute of Illinois governing criminal offenses, we are not concerned" (Italics ours).

The decision in *Skelly* v. *United States*, 76 F. (2d) 483, is not opposed to the foregoing. There the indictment was not limited to a conspiracy merely to transport the kidnapped person in interstate commerce; it set forth a much more comprehensive conspiracy, namely, a conspiracy first to kidnap and transport in interstate commerce, then to hold for ransom, then upon receipt of the ransom money to convert that money into other money or securities in order to avoid detection, etc. (*id.* at p. 485). All that was alleged to be the conspiracy of the defendants. What was there done subsequent to the transportation of the kidnapped person was consequently part and parcel of the original and only conspiracy charged. It was not, as in the case at bar, wholly outside of and apart from the conspiracy averred in the indictment.

Since the defendant was not party to the conspiracy to transport the bonds from Minneapolis to New York, it is submitted that his subsequent conduct in relation to the disposal of the stolen property furnished no warrant for his conviction under the second count of this indictment.

II

A. The court below erred in ruling that, under the statute in the form in which it was when the alleged offense was committed, the disposal of securities, at rest in New York and stolen while not moving in or constituting a part of interstate commerce was a crime against the United States.

B. It further erred in holding that the defendant was an accessory after the fact of a conspiracy, when he was not indicted as such; and in thereupon upholding his sentence, although it was double that which could be lawfully imposed upon an accessory after the fact.

A. The crime in question in the case at bar was committed in 1937 and 1938, according to the indictment (fol. 11). During all of that period, section 416 of title 18 of the United States Code (Act of May 22, 1934, c. 33, sec. 4, 48 Stat. 795) proscribed as criminal the receipt, sale, or disposal of securities which had been stolen "while moving in or constituting a part of interstate or foreign commerce." Quite plainly that enactment did not make the disposal of stolen securities a federal offense under any and all circumstances. The statute manifests no such purpose. As its language plainly declares, sale and disposal of stolen securities was made a crime against the United States, *only* if the theft occurred while the securities were moving in or a part of interstate commerce. And that was expressly ruled by the Circuit Court of Appeals in *Gable* v. *United States*, 84 F. (2d) 929, 930. The court there held that:

> "Under the act here relied upon, the receiver [of the stolen securities] is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the

present case the property received by appellant was not stolen while moving in such commerce. Rather it was stolen in the State of Missouri, thereafter transported to Chicago, and then delivered to the appellant. Consequently, there is no proof of guilt under section 416."

On August 3, 1939, long after the commission of the alleged crime in this case, the statute was materially amended (Act of Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178). It is unnecessary, however, to discuss that amendment in this relation. It cannot affect the situation now before the Court. If it made that criminal which was not criminal at the time when it was done, the amendment would plainly constitute an invalid *ex post facto* law. Constitution, Art. I, sec. 9; *Calder* v. *Bull*, 3 Dall. 386, 390; *Kring* v. *Missouri*, 107 U. S. 221, 225, *et seq.*

Hence it is indisputable that, when the alleged criminal act was committed in the case at bar, there was no federal law which denounced as criminal the disposition of stolen securities, unless they had been stolen while moving in or a part of interstate commerce. *Gable* v. *United States*, 84 F. (2d) 929, 930. Here, however, the bonds were stolen while at rest in Minneapolis and before they ever were transported in or became a part of interstate commerce at all; and hence section 416 of title 18 of the United States Code was plainly not applicable.

As disposal of securities, not stolen while in interstate commerce, was not a federal offense, under the statute governing this case, it is clear that a conspiracy to dispose of such property could not violate the law which forbids parties to conspire to commit an offense against the United States (sec. 88, title 18, U. S. Code). Hence it is impossible to perceive how the court below could hold that it was a federal "crime to join a conspiracy to dispose of" the stolen bonds in this case (fol. 1309).

B. The court below apparently also believed that it was justified in regarding this defendant as an accessory after the fact and, on that score, in holding him guilty of the crime of which he was convicted. That theory was not urged by the Government in the courts below. It was never mentioned to the jury; and it is certain that they regarded the defendant, not as an accessory after the fact, but as a principal. This new theory is predicated on section 551 of title 18 of the United States Code, which is not even referred to in the indictment; and nothing in the indictment makes even the remotest mention of the defendant's conduct in disposing of the stolen securities, or of his being charged with being an accessory after the fact (pp. 3-6).

In view of the fact that section 551 provides that an accessory after the fact shall be liable only to one-half the punishment prescribed for the principal, it is, moreover, plainly necessary that the indictment should charge him as such, to the end that, if convicted, the court may know that he has not been found guilty as a principal and may not erroneously punish him as such. Wharton, Criminal Law, sec. 285; 42 C. J. S. 1078, sec. 149; 31 Corpus Juris 845, sec. 458. In the case at bar, however, the defendant was sentenced, not as an accessory after the fact, but to two years' imprisonment and to a $10,000 fine (fol. 1046; p. 403), the maximum penalty prescribed for principals in the crime of conspiracy (sec. 88, title 18, U. S. Code). It is therefore quite plain that this conviction has been affirmed on a theory which never occurred to anyone in the case until it was evolved in the court below.

Analysis of the doctrine thus enunciated in the opinion below, soon demonstrates its erroneous character. The acquittal of the defendant establishes that he was neither a principal nor an accessory before the fact in so far as the transportation of the securities in interstate commerce is

concerned; and the court below itself recognized that he had no part in the conspiracy to transport the stolen securities from Minneapolis to New York (fols. 1305, 1309). His participation had to do exclusively with the disposal of the securities after they came to rest in New York; and, as the court below itself noted (fol. 1309) what he did thereafter "was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

In helping a thief to dispose of stolen property in New York, one might perhaps be deemed an accessory after the fact of the larceny. But that would not be a crime against the United States; and the defendant was not charged with or tried for that offense. Moreover, it is well settled at common law that receivers of stolen property are not accessories after the fact. 1 Bishop, Criminal Law, 692, 695, 699; Wharton, Criminal Law, vol. I, p. 370, footnote.

And it is, furthermore, simply impossible to regard the defendant as an accessory after the fact in respect of the crime of conspiracy. The conspiracy in the case at bar was over and finished when the property came to rest in New York. The subsequent disposal of the stolen property might perhaps be regarded as accessory after the fact of the theft; but it had and could have no relation to the executed conspiracy. Persons may aid conspirators while the conspiracy is still open and in progress, and, if they do, they become parties to the conspiracy as principals, and not as accessories at all. But when the conspiracy is ended, that crime is finished; and no one can then be an accessory after the fact in respect thereof, and certainly not in any such sense as shall render him liable as a co-conspirator and a principal. Such a rule would simply nullify the long-settled doctrine that one is not a party to a conspiracy who acts

only after the fulfillment of the object of the conspiracy and the end thereof. *Lonabaugh* v. *United States*, 179 Fed. 476; *De Luca* v. *United States*, 299 Fed. 741, 745; *Gable* v. *United States*, 84 F. (2d) 929.

It was not error to hold that the defendants in the *Skelly* case, 76 F. (2d) 463, were co-conspirators, because they became parties to an open and existing conspiracy. But that is the precise contrary of the situation in the case at bar: here the conspiracy charged was ended, as the court below conceded (fol. 1309), when the transportation terminated and the securities "came to rest in New York."

The injustice of the rule laid down in the court below is perhaps made clearer when it is considered from the standpoint of protecting the defendant from subsequent prosecution for the offense of which he has now been convicted. If the defendant were hereafter to be indicted for conspiring with the others to dispose of the stolen securities, the present conviction would not enable him to maintain a plea of double jeopardy. To do so, the defendant would have to show that the prior prosecution was "for the same identical offense." *Burton* v. *United States*, 202 U. S. 344, 380; *Montrose Lumber Co.* v. *United States*, 124 F. (2d) 573, 575. The indictment in this case, however, says nothing about being an accessory after the fact, or about disposing of the stolen property, or about conspiring so to do. It manifestly concerns itself with a quite different offense. In *Reynolds* v. *People*, 83 Ill. 479, 483, it was held that an acquittal of a defendant as an accessory after the fact did not bar his prosecution as a principal in the offense itself. The court said:

> "The offense of which an 'accessory after the fact' may be guilty, is not included, nor has it any connection, with the principal crime. This is apparent from the definitions given, both in our statute and in the common law. The one cannot be committed until the principal

> offense is an accomplished fact * * * The guilty knowledge, which is the essence of the offense, comes after the principal crime is committed, and of course they can have no connection with each other. But no better test need be sought than the fact that a party indicted as a principal and acquitted may yet be indicted as an 'accessory after the fact,' or if indicted as an 'accessory after the fact' and acquitted, he may be indicted as a principal, and the reason assigned in the common law authorities is, that they are 'offenses of several natures.' Hence a conviction of one is no bar to a prosecution for the other."

The foregoing considerations are undoubtedly the reasons which underlie the well-established rule that an accessory after the fact must be indicted as such. Wharton, Criminal Law, vol. I, sec. 285; 42 C. J. S. 1078, sec. 149; 31 Corpus Juris, 741, 845, secs. 291, 458.[5]

Accordingly, it is submitted that it was error for the court below to affirm the defendant's conviction of the conspiracy charge on the theory that he was an accessory after the fact of that crime and thus became a co-conspirator after the conspiracy terminated. In addition, if the defendant was an accessory after the fact, his sentence was manifestly excessive and illegal.

III

The court below erred in reversing its original holding that the erroneous charge of the trial judge warranted a new trial.

The strong feeling of the trial judge that the defendant was guilty of both of the offenses charged in the indictment,

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[5] "An accessory after the fact cannot be convicted on an indictment charging him as principal." Wharton, Criminal Law, vol. I, sec. 285.

"The accessory after the fact is left by the statutes generally as at common law; he must be indicted as such, and cannot be treated as a principal." 42 C. J. S. 1078, sec. 149.

clearly appears from the record (e. g., fols. 918-22, 1045). When, therefore, the jury at 10 o'clock at night reported that it was in "a hopeless deadlock" and unable to agree (fols. 1026, 1027), about seven hours after the cause had been submitted to them (fols. 1024, 1026), the trial judge, without any request from them (fols. 1027-28), deemed it his duty to give them further instruction on the law (fol. 1028 *et seq.*). In the proceedings which then ensued, the trial judge made it plain enough that he thought that the defendant should be convicted, although of course he did not say so in so many words. In addition to the plainly erroneous directions which are discussed below, the trial judge then said (fols. 1032, 1034, 1035):

> "I want you to go out and deliberate, and I don't want you to be fooled in this case * * *
>
> "I think in this case there ought not to be any difficulty in coming to a proper verdict * * *
>
> "I am going to wait here until half-past ten. You don't have to agree by half-past ten, but if you haven't agreed by that time I will send you to a hotel tonight. That doesn't mean you have to agree at 10:30. You can take as much time as you want, tonight, tomorrow and tomorrow night if you need it."

The trial judge then charged the jury that recent possession of stolen property by the defendant, if unexplained, justified the conclusion by the jury that the defendant knew the property was stolen (fols. 1028-30). There was no need for that instruction in the case at bar. In his statement to the government's representatives, the defendant had admitted that he learned that the bonds were stolen "after the bonds had been sold or during the consummation of the selling of the bonds" (fols. 1178-79). Such a direction could therefore only tend to confuse the jury.

A juror then asked (fol. 1032): "Can any act of conspiracy be performed after the crime is committed?" The

court turned that question aside with a quite irrelevant response (fol. 1032). Of course it should have been answered directly and fully. The jury should have been told, clearly and pointedly, that the only conspiracy charged had for its object the carriage of the stolen securities from Minneapolis to New York; that that conspiracy came to an end when its object was attained, when the bonds came to rest in New York; and that what happened thereafter could not make the defendant a party to the antecedent conspiracy charged in this indictment. It was manifestly his failure thus to instruct the jury which subsequently resulted in their sending the court a written inquiry reading as follows (fol. 1041):

> "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?"

This inquiry, it is submitted, plainly required the court to advise the jury concerning the precise character of the conspiracy charged in the second count, and when that conspiracy ended, and that subsequent disposition of the bonds—whether with or without knowledge that they were stolen property—was and could be no part of that previously terminated conspiracy. Instead, the court first vaguely remarked that "Of course if it occurred afterwards it would not make him guilty" (fol. 1041). Did that mean that if knowledge that the bonds had been stolen came to the defendant *after* he had aided in selling the bonds, he would not be guilty of the conspiracy charged; but that, if he possessed that knowledge *when he helped to dispose of them*, he would be guilty of the conspiracy charge, despite the fact that he had never had any part in the conspiracy until it was all over? That would certainly seem to be a natural deduction from the court's answer to the jury's inquiry, and it would be patently erroneous.

Nor did the court even permit the matter to remain in that vague and unsatisfactory state. It followed the remark just referred to with another instruction concerning the entirely irrelevant proposition that possession of stolen goods may give rise to a conclusion of guilty knowledge (fol. 1041), and then proceeded to aggravate the situation by winding up its additional charge with a concededly erroneous and quite misleading instruction (fols. 1041-42). The court's final word to the jury was (*id.*):

> "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft *raises a presumption that the possessor was the thief and transported stolen property in interstate commerce.*" (Italics ours.)

"Certainly," declared the court below, in reference to this charge (fol. 1313), "it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce". (See also fol. 1310 to like effect.) And no one now claims otherwise.

Immediately after hearing these final instructions, the foreman of the jury significantly remarked, "I think we will reach a verdict in a short time. * * * Just about fifteen minutes" (fols. 1043). And indeed in about five minutes the jury were back with a verdict of guilty on the second count (fols. 1043-44). It is plain that they took the court's final instructions as in effect a direction by the court to convict forthwith; and they did so at once. *Malaga* v. *United States*, 57 F. (2d) 822, 828.

In its original opinion herein, the court below declared that the jury must have relied on this erroneous presumption which the trial judge had laid down, and therefore it ordered a new trial (fols. 1315-16). However, on being later advised by the prosecution that the defendant knew the bonds were stolen when he disposed of them, it revised the

last paragraph of its opinion and affirmed the judgment of the trial court (p. 450). It is submitted that that disposition was a mistaken one. It is just as baseless, in our opinion, to presume that a defendant has transported property in interstate commerce, when he is ignorant that it was stolen outside the state, as when he knows that it was so stolen. In one case it is clear that he may not know that the stolen goods were ever transported in interstate commerce. In the other, while he may know that such transportation occurred, it nevertheless by no means follows that *he* is the one who transported the property in interstate commerce. Such "a presumption that the possessor was the thief and transported stolen property in interstate commerce" (fol. 1042) means that every receiver of stolen goods is presumed first to be the thief and then further presumed to be the one who transported the goods in interstate commerce. Such a process of heaping presumptions on top of each other merely substitutes arbitrary assumption for proof and sensible inference in criminal cases.

And the error goes even deeper in the case at bar, where this jury acquitted the defendant of the substantive crime, and so found that he was not the thief and did not transport the goods in interstate commerce. Their verdict on the first count is thus at war with the "presumption" which appears to have led them to convict on the second count. Here, moreover, the jury must have carried the presumption even one step further, since they used it to sustain them in finding that the defendant was a conspirator who plotted with others to transport the stolen securities, when the proof is clear that he had no part in the illicit transactions until the bonds came to rest in New York and the conspiracy was over.

It is respectfully submitted that the additional charge of the trial judge was erroneous; that it in effect ordered the jury to convict the defendant; and that its vagueness and

confusion manifestly prevented a fair and proper disposition of the case by the jury. What the Circuit Court of Appeals overlooked in its second opinion was the devastating effect of the additional charge. The jury was disturbed about the issue of when the knowledge of the origin and character of the bonds first came to the defendant. The court's charge, however, removed all necessity for further consideration by the jury of this question. The effect of the erroneous charge was virtually to compel the jury to by-pass the issue of defendant's knowledge as it was shown by the defendant's statements (Exhibit 69, fol. 1131; Exhibit 70, fols. 1178-1179), and substitute in place thereof the erroneous presumption of guilty knowledge and illegal transportation.

IV

The court below erred in holding that the stolen securities had the necessary value prescribed in the controlling statute.

Section 415 of title 18 of the United States Code, the statute upon which this indictment is based, made it a crime to transport stolen securities in intersate commerce only if the securities were "of the value of $5,000 or more." That was the form in which the statute stood when the alleged offense charged herein was committed. Manifestly this statute could have no applicability to securities whose actual value was nothing; and in the case at bar it is true, as a matter of law, that the stolen securities were quite worthless.

The bonds in question were attached to proofs of claims filed in bankruptcy (pp. 9-18). By order of court, those claims were duly allowed (p. 401). Thereafter the bonds were stolen. The allowance of a claim in bankruptcy constitutes an adjudication of the claim in the same manner as if judgment had been rendered thereon. *United States* v.

American Surety Co., 56 F. (2d) 734, 736; *Lewith* v. *Irving Trust Co.*, 67 F. (2d) 855, 856-57. "Such an allowance has all the substantial elements of a judgment, and has the effect of a judgment" (*Lewith* case, *supra*). And "if there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatum*, and judgment thereon remains in full force unreversed, the original cause of action is merged and gone forever." *United States* v. *Leffler*, 1 Pet. 86, 100, 101; *Hamer* v. *New York Rys. Co.*, 244 U. S. 266, 272. Hence it is indisputable in the case at bar that when the bankruptcy court made its order allowing the claims predicated upon the bonds in question, the obligations which those bonds had previously evidenced ceased to exist and were no longer operative; the bonds thereupon became mere pieces of paper. Even in the hands of subsequent purchasers without notice, they would be worthless (N. Y. Negotiable Instruments Law, sec. 91, subd. 2; and sec. 97); they were long past due, as well as merged in judgment.

In the absence of statute to the contrary, it is the established law in the states that it is not larceny to steal ineffective, inoperative, or void instruments. *People* v. *Loomis*, 4 Denio (N. Y.) 380, 382. Thus, it was laid down in the *Loomis* case, *supra*, that:

> "It is well settled that to bring a case within the purview of the latter statute, the written instrument taken by theft or robbery, must not only have been made and executed in due form and manner, but must also have remained unsatisfied and in full force, so that, when taken, it was an effective and valuable security. The instrument, although complete in form and signature, and ready to be issued or delivered according to its design, could not while in that state, be subject of robbery or larceny. Nor could such an offense be committed in regard to a security, originally valid but

which had since been paid and satisfied, for it was no longer available for its original purpose, or of value to anyone."

So if a thief were to steal a packet containing counterfeit bills of the face value of $10,000 and transport them in interstate commerce, it is clear that he would not violate the statute which is applicable in this case, since what he had thus transported in interstate commerce was certainly not "of the value of $5,000, or more," as required by this act. And it would be quite immaterial, so far as this statute is concerned, that thereafter he had passed the bills off on another and had received $10,000 therefor. That would make him guilty of a second crime, it is true, but it would not endow the worthless counterfeit with any value. These observations expose the fallacy which underlies the assertion of the court below that the stolen securities herein "had an actual value of $5,000, as the record shows, even though it was factitious" (fol. 1303). The circumstance that the subsequent sales of the securities might have defrauded the buyers out of $5,000 or more, could not give *value* to the stolen pieces of paper, which had once been obligations but had long before been discharged as such and had become wholly inoperative. The question was one of the value, the actual value, and not one concerning the factitious or fictitious value of the stolen property; and certainly not of the value which worthless paper may have to swindlers as instrumentalities for the accomplishment of subsequent frauds or thefts by them.

Congress itself seems to have recognized that that was the proper interpretation of sections 415 and 417 as they read when the offense at bar is charged to have been committed; for it subsequently and on August 3, 1939, amended the law, so as to make the test of the jurisdictional value no longer merely the actual value of the stolen securities,

but "the face, par, or market value, whichever is the greatest" (see sec. 417, title 18, U. S. Code as amended Aug. 3, 1939, c. 43, sec. 3, 53 Stat. 1178). "The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended, demonstrates the intent to change the preexisting law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." *United States* v. *Bashaw*, 50 Fed. 749, 753-54; *United States* v. *Field*, 255 U. S. 257, 264-65; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Here it should be pointed out that the court below inadvertently fell into error when it declared that, "Besides stolen 'securities', presumably valid, the statute covers 'falsely made, forged, altered or counterfeited securities'" (fol. 1302). Section 415, as it stood when the offense at bar was perpetrated, did not cover "falsely made, forged, altered or counterfeited securities." That language was added a year and a half later in August, 1939, when section 415 was amended (Act of Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178). Hence the argument of the court below, that "it can scarcely have been the purpose of Congress to exclude a security, originally valid but later merged in a claim, and yet to include securities void from their inception" (fol. 1302), is quite without basis in fact. The legislative history of the section establishes plainly that Congress had no intent to include void or inoperative securities within the prohibition of section 415 until long after the time with which alone we are concerned.

Nor does it advance the case of the prosecution to refer to the stolen securities as "altered securities," as did the court below (fol. 1303). Not only were these securities not altered, but the statute applicable herein made no reference whatever to forged or altered securities. It

was only when section 415 was amended a year and a half later (Act of Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178) that it cured that defect by including forged, altered, and counterfeit securities. Manifestly that plainly establishes that Congress did not contemplate the inclusion of void and spurious securities, when it originally proscribed the interstate transportation of stolen "securities," i. e., valid and valuable securities, alone.

It is submitted that the necessary jurisdictional value did not exist in the case at bar.

Conclusion

For the foregoing reasons, it is respectfully submitted that the conviction of the defendant-petitioner should be reversed and the indictment dismissed.

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APPENDIX

SECTION 88, Title 18, U. S. Code

(Criminal Code, section 37.) Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

SECTION 415, Title 18, U. S. Code—before amendment

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

SECTION 415, Title 18, U. S. Code—as amended August 3, 1939

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall trans-

port, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 3, 48 Stat. 794; Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178).

SECTION 416, Title 18, U. S. Code—before amendment

Same; receipt or disposal of goods, securities or money feloniously taken while a part of interstate commerce.—Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than ten years, or both. (May 22, 1934, c. 33, sec. 4, 48 Stat. 795.)

SECTION 416, Title 18, U. S. Code—as amended August 3, 1939

Same; receipt or disposal of goods, securities or money feloniously taken; receipts of articles used in counterfeiting. Whoever shall receive, conceal, store, barter, sell, or dispose

of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited, or whoever shall receive in interstate or foreign commerce, or conceal, store, barter, sell, or dispose of, any such bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in Section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:251) or (2) an obligation, bond, certificate, security, Treasury note, bill, promise to pay, or bank note issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 4, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178).

SECTION 417, Title 18, U. S. Code—before amendment

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or

more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof (Sections 415, 416 of this title). (May 22, 1934, c. 333, sec. 5, 48 Stat. 795).

SECTION 417, Title 18, U. S. Code—as amended August 3, 1939.

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of section 3 and 4 hereof (Sections 415, 416 of this title), and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest. (May 22, 1934, c. 333, sec. 5, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 3, 53 Stat. 1178.)

SECTION 550, Title 18, U. S. Code

(Criminal Code, section 332). "Principals" defined.—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

SECTION 551, Title 18, U. S. Code

(Criminal Code, Section 333). Punishment of accessories.—Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.